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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 88

DARWIN CHARLES BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 43 Misc.

MATTHEW THOMAS KENT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed the conviction *per curiam* (Pet. App. 15b)[1] without opinion.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1966 (Pet. App. 15b). A petition

[1] References designated "Pet." are to the petition in No. 88, which is adopted by the petition in No. 43 Misc. "J.A." refers to the joint appendix in the court of appeals.

for rehearing was denied on February 15, 1967. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including April 15, 1967. The petition in No. 88 was filed on April 14, 1967. The petition in No. 43 Misc. was filed on April 17, 1967, and is out of time. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in refusing to inspect the minutes of the grand jury to see if the indictment, valid on its face, was supported by sufficient evidence.

2. Whether the indictment is fatally defective because it does not specifically name all of the co-conspirators.

3. Whether it was error for the trial court to refuse to consolidate the ten separate substantive counts of the indictment charging fraudulent sales of securities through the mails.

4. Whether the court's instructions to the jury concerning the number of schemes and conspiracies were proper.

5. Whether the prosecutor's summation was prejudicial.

STATEMENT

Petitioners were convicted by a jury in the United States District Court for the District of Columbia on six counts of an eleven-count indictment charging, in ten substantive counts, securities fraud violations of Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), and a single count charging conspiracy

to commit such offenses (Pet. App. 21c–37c; Tr. 3356–3358). Petitioner Brown was convicted on five substantive counts and conspiracy. Petitioner Kent was convicted on four substantive counts and conspiracy. Each was sentenced to imprisonment for a period of four months to one year and a day on all counts, to run concurrently, and fined (J.A. 71–74). Except for the fine, the sentences were suspended and each petitioner placed on probation for a period of three years. The court of appeals affirmed the convictions *per curiam* without opinion (Pet. App. 15b).

1. In March 1964, a grand jury for the United States District Court for the District of Columbia returned a ten-count indictment charging petitioner Brown and one Ralph H. Whitmore with nine separate offers to sell securities of Inter-American Timber Corporation (hereinafter "IAT") in a fraudulent scheme, in violation of 15 U.S.C. 77q(a), and conspiracy to commit such offenses (Pet. App. 1c–14c). In the same month, the same grand jury returned another indictment charging petitioner Brown, Ralph H. Whitmore and petitioner Kent (No. 43 Misc.) with a single offer to sell securities of Venezuela Mines, Inc., in a fraudulent scheme, in violation of 15 U.S.C. 77q(a), and conspiracy to commit such offense (Pet. App. 15c–20c). Subsequently, certain matters were brought to the attention of the government which indicated that the fraudulent schemes alleged in the two indictments were, in fact, one scheme aimed at the same investors during approximately the same period of time by the three defendants (Tr., Motions, Nov. 6, 1964, p. 12). Thereafter, the transcripts of testi-

mony before the first grand jury were presented, along with the testimony of one witness, to a new grand jury (Tr., Motions, Nov. 6, 1964, p. 16). In August 1964, the new grand jury returned an indictment basically consolidating the prior two indictments and charging both petitioners Brown and Kent, as well as Whitmore,[2] with ten substantive offenses of offering for sale securities in IAT (nine counts) and Venezuela Mines, Inc. (one count) in a fraudulent scheme, in violation of 15 U.S.C. 77q(a), and a single count of conspiracy to commit the offense charged in the first ten counts (Pet. App. 21c–37c).

2. The evidence at trial showed that Kent (petitioner in No. 43 Misc.) heard about a possible timber investment venture in Surinam, South America, from one Joseph Harris. In the spring of 1959, Kent notified Harris that he had interested Whitmore in obtaining financing for the venture (Tr. 22, 770–773, 2449–2450, 2457, 2781). At the time, Whitmore worked for the Stanford Corporation (controlled by George Stanford), a broker-dealer in the District of Columbia, and petitioner Brown was counsel for the Stanford Corporation (Tr. 23–24, 617, 619–620). Stanford, Whitmore and Brown discussed the possibility of a public offering of securities in connection with the timber venture (Tr. 24, 26–29). Thereafter, Kent arranged a meeting in Miami attended by Kent, Whitmore and Harris, during which Harris was introduced to Brown over the telephone (Tr. 24–25, 777–780, 1002–1003, 2179). They discussed Harris' plan to

[2] Whitmore pleaded guilty before trial to count 2 of the indictment (J.A. 6).

acquire timber concessions in Surinam and a tentative understanding was reached that, provided some $850,000 could be raised, Brown, Whitmore and Kent would form an American company to develop the concessions (Tr. 777–780, 802–803, 827). Following further discussions Brown, in June, 1959, wrote to Harris to obtain fourteen items required to prepare a registration statement for filing with the Securities and Exchange Commission (J.A. 76–77; Tr. 26–30, 62–63).[3] When Harris was unable to furnish the necessary documents (Tr. 40–42, 774, 786), Stanford dropped the deal (Tr. 51–53).

In October 1959, Harris (and others) formed the Surinam Timber Corporation (Surtimco). Later that month Surtimco received a concession of 30,000 acres of timber from the Surinam government (Tr. 789, 1026–1027). In November 1959, Whitmore left the Stanford Corporation to spend full time on the timber underwriting (Tr. 43, 2538). Brown and Whitmore decided to raise $850,000 privately rather than through a public stock offering (Tr. 43–44, 2543). At Whitmore's request, Harris applied for an additional 100,000 acres of timber concessions for Surtimco. To do this Harris had to surrender all of his prior concessions (30,000 acres) and make a new application for 125,000 acres (Tr. 792, 1026–1027).

In December 1959, Brown and Whitmore formed the Inter-American Timber Company, a co-partner-

[3] These items included, among other things, the grant by the Surinam government of timber rights on 125,000 acres of virgin timber land; corporate documents and financial statements of the Surinam corporation acquiring the concessions; a title opinion on the land in question; etc. (J.A. 76–77).

ship with no assets (Tr. 44–45, Government Exhs. 4 and 5), which was incorporated in April, 1960 (Tr. 44, 2784). Brown controlled the venture. He opened the bank account on which he was the sole authorized signatory, arranged for telephone service, signed the lease, and kept all records including correspondence files, bank statements, bills, stock ownership records and minutes (Tr. 44–50, 204, 211, 216, 2562, 2786–2791). He held himself out variously as president, secretary-treasurer and director of IAT (Tr. 45–46, 1342, 2783; J.A. 77–78).

In mid-December Brown told Whitmore to begin selling IAT pre-incorporation stock (Tr. 44, 50–51, 2542–2543, 2783). In January 1960, he issued commission checks to Whitmore of $500, $750, and $2,500 for sales to IAT investors. For his own services, Brown issued a $2,500 check payable to his law firm and received 100,000 shares of IAT stock (Tr. 206–209, 2558, 2644–2646). Kent's request to Brown and Whitmore for a finder's fee for arranging the timber deal was delayed as premature, but Kent was told to stay in touch on it (Tr. 2180–2181).

On February 8, 1960, Harris received a notice from the Surinam government which specified a number of conditions to be met by Surtimco before it could obtain a concession of 25,000 acres of timber lands and left the possibility of extending the concession to 125,000 acres contingent upon satisfactory compliance with the conditions for the 25,000

acres (Tr. 805–806; J.A. 139–140).[4] Brown was well aware of these circumstances during the relevant period (Tr. 797–805, 808, 812–813, 1102–1103, 1271–1275, 2576).

In March 1960, at Brown's request Harris attended conferences at Brown's office in Washington, D.C., at which Whitmore and Kent were also present (Tr. 807–810, 812–813). During the conferences, Brown prepared in his own handwriting a draft of an IAT stock offering brochure dated March 1, 1960 (Tr. 813–814; Gov't Exh. 6). At that time, Brown had Surtimco's financial statement for 1959 that showed the company did not have any timber concessions (Tr. 815–818, 820–821; Gov't Exh. 47). However, Brown included an asset of $93,299,400 for standing timber in his handwritten draft (Gov't Exh. 6). Brown then prepared a typewritten version of the brochure on his own letterhead (Gov't Exh. 7). Kent, who was acting as an accountant for IAT, checked the financial statement in the brochure and made certain corrections (Tr. 1340–1343, 1347, 1380, 2183, 2312, 2491–2492). Brown rechecked it and made other revisions (Tr. 71–73, 77–78, 1339–1340, 1346–1347). Kent and Whitmore then had the brochure printed. The balance sheet of the printed version of the brochure indicated that IAT had assets including "Cash (Realized from sale of 137,500 shares at $1.00 per share) $137,500" and 125,000 acres of timber concessions from the Surinam government valued at

[4] Surtimco did not actually acquire the first 25,000 acre timber concession until August 29, 1960 (Tr. 1028; Def's Exh. 21A).

$9,322,940 (J.A. 81). IAT never realized more than about $13,000 from the sale of stock and never acquired any timber concessions (J.A. 77–78; Tr. 44, 90, 204, 1443, 2783–2784).[5] Brown sent the printed brochures from his office to prospective investors (Tr. 89–90, 167, 734), in some instances under his own covering letter (Tr. 2989–2994; Gov't Exh. 21 B, C, D).

In March 1960, a Dr. Steelman, who headed a group of investors Brown and Whitmore had been trying to interest in the timber venture (Tr. 367–368, 836), visited Brown's office. Brown told him that IAT had 125,000 acres of timber concessions valued at over $93,000,000, and gave Dr. Steelman two balance sheets which reflected these assets (J.A. 204, 205; Tr. 2082–2083).

In April 1960, Harris sent Whitmore a telegram worded as Whitmore had dictated over the telephone (J.A. 85; Tr. 109–110, 836–837). It stated that Surtimco had received $6,000,000 in timber orders backed by irrevocable letters of credit (J.A. 85). Surtimco had in fact no orders for timber (Tr. 110, 837–838). Brown and Kent knew the telegram was false (Tr.

[5] The balance sheets were marked "*pro forma*" to indicate that the books and records of the enterprise were adjusted to incorporate hypothetical transactions which had not occurred at the date of the balance sheet. However, a *pro forma* financial statement, such as this one, that does not disclose the assumptions on which it is based, is false and misleading (Tr. 1557, 1561–A, 1562, 1564, 3044–3045, 3055–3059, 3061–3062, 3069, 3073–3074). See *United States* v. *Benjamin*, 328 F. 2d 854, 861 (C.A. 2), certiorari denied *sub nom. Howard* v. *United States*, 377 U.S. 953; *Leedy, Wheeler & Co.*, 16 S.E.C. 299, 307–308; Hills, *The Law of Accounting and Financial Statements*, 34–35 (1957).

109–119, 837–838). Brown had Western Union make up duplicate copies of the telegram which he inserted in the IAT brochures sent to prospective investors (Tr. 113, 2990; Gov't Exhs. 21C and 58). A person named Suggs invested $5,000 after being told by Brown and Whitmore that IAT stock was to be registered with the Securities and Exchange Commission and that it was then to be offered to the public at $5.00 a share (Tr. 98–102, 723–734). After Suggs received the brochure and telegram, he invested another $1,000 in IAT (Tr. 727–738; Gov't Exh. 42).

By July 1960, Brown, Whitmore and Kent had become interested in promoting a mining venture in Venezuela (Tr. 131–132, 2433–2434, 2443–2444, 2484, 2816). Venezuela Mines, Inc. founded by Brown was supposed to lease diamond concessions from a Venezuela corporation called Minera-Uraima. Brown became vice-president and director and kept all corporate and business records (Tr. 2426–2427, 2825, 2885, 2887). R. H. Whitmore & Co., an investment banking firm incorporated by Brown in April 1960, was to raise the $350,000 needed to acquire Minera-Uraima's purported diamond concessions (Tr. 124–125, 131–132, 1900, 2433–2434, 2443–2444, 2484, 2819–2820). Brown was an officer, director and stockholder of R. H. Whitmore & Co. and kept its corporate and business records (Tr. 124–125, 217, 2825, 2886, 2887; Gov't Exh. 13). R. H. Whitmore & Company's bank account was opened with money obtained from John Suggs, one of the IAT investors (Tr. 124–125).

In the latter part of 1960, Whitmore invited one Pfeiffer, an IAT investor, to invest in Venezuela

Mines stock. Pfeiffer was told that diamonds were so plentiful it was possible to rake them up by hand and that Venezuela Mines stock would be registered with the SEC within sixty to ninety days (Tr. 899). Kent, who was an experienced stock salesman, spoke to Pfeiffer on the telephone and echoed what Whitmore had said, adding that Venezuela Mines' diamond and gold concessions in Venezuela were worth millions of dollars (Tr. 900–903, 909, 976, 2119). Pfeiffer invested $5,000 in Venezuela Mines stock (Tr. 135–136, 908, 2656; Gov't Exhs. 61A, 61B and 61C). In December 1960, petitioner Kent, Whitmore and the principals of Minera-Uraima (Hea and Taube), met in Caracas to discuss a merger between Venezuela Mines and Minera-Uraima ~~(Hea and Taube), met in Caracas to discuss a merger between Venezuela Mines and Minera-Uraima~~ (Tr. 230–231, 986–987, 1880–1882, 1889, 1896, 1900, 1903–1906, 1912, 1925, 1932, 1949–1950, 1983; Gov't Exh. 23). The merger never took place, and Venezuela Mines never had any gold or diamond concessions in Venezuela (Tr. 230–231, 1485, 1488, 1537, 1574, 1880–1882, 1888–1890, 1896, 1903–1906, 1912, 1925, 1932–1933, 1949–1950, 1983, 2898). Nevertheless, Brown assured Pfeiffer that Venezuela Mines already owned the mineral concessions (Tr. 996–998).

In June 1960, before the trip to Caracas, Kent had copies of a stock offering brochure for Venezuela Mines printed (Tr. 1348, 1381; J.A. 85–125). Brown reviewed the brochure before it was printed (Tr. 2933). The brochure represented that Venezuela Mines owned Venezuela mineral concessions valued at more than $100,000,000. R. H. Whitmore & Co. was listed as an "independent" financial consultant to Vene-

zuela Mines. Brochures printed in March 1961 were sent to prospective investors by Brown (Tr. 1424, 2425, 2946–2954; Gov't Exhs. 22A, B, C).

ARGUMENT

1. There was no reason for the trial court to examine the grand jury minutes to determine whether it was supported by sufficient evidence (see Pet. 7–11). It is conceded that the grand jury which returned the original indictments heard extensive testimony. The second grand jury, which merely consolidated the two indictments, had before it, not only the transcripts of the "extensive testimony" taken at the prior grand jury, but an additional witness. This was sufficient. *Costello* v. *United States,* 350 U.S. 359.

Umans v. *United States,* certiorari granted February 27, 1967 (No. 967, O.T., 1966), involves a significantly different factual situation. There the evidence before the grand jury consisted of signed statements by persons who had not appeared before any grand jury. Here the grand jury which returned the consolidated indictment had the full transcript of the prior testimony as well as the testimony of a witness. As stated in *Costello* (350 U.S. at p. 363): "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits".

2. The fact the indictment did not name all of the co-conspirators—three of whom were subsequently identified in a bill of particulars—was not an infringement of the constitutional right to be tried on an indictment of a grand jury (Pet. 11–15). The perti-

nent part of the indictment charged as follows (J.A. 26):

> From on or about May 1, 1959 and continuing to on or about May 1, 1961 the defendants Darwin Charles Brown, Ralph H. Whitmore and M. Thomas Kent in the District of Columbia and within the jurisdiction of this Court and at other places to the Grand Jury unknown, would and did unlawfully, wilfully, and knowingly combine, conspire, confederate, and agree together and with each other and with other persons to the Grand Jury unknown, to commit offenses against the United States, namely to violate Title 15, United States Code, Section 77q(a) * * *.

This is a precise statement of the offense charged and, when considered with the detailed overt acts, constitutes a plain, concise and definite statement of the essential facts necessary to apprise petitioner of the charges for preparation of his defense and to protect him from double jeopardy. Rule 7(c), F.R. Crim. P. The failure of the grand jury to name as "unindicted co-conspirators" persons known to them to have been connected in some way with the conspiracy does not constitute a fatal variance when at trial it appears that the unnamed unindicted persons are, in fact, co-conspirators. See *Fox* v. *United States*, 45 F. 2d 364, 365 (C.A. 7); *United States* v. *Melekh*, 193 F. Supp. 586, 599 (N.D. Ill.). Nor does a listing as co-conspirators in a bill of particulars of persons not named in the indictment constitute an amendment of the indictment. *E.g.*, *United States* v. *Comyns*, 248 U.S. 349, 353; *Dunlop*

v. *United States,* 165 U.S. 486, 491; *United States* v. *Lefkoff,* 113 F. Supp. 551, 555 (E.D. Tenn.). The names of such individuals are not descriptive of the offense charged. See *Prichard* v. *United States,* 181 F. 2d 326, 330–331 (C.A. 6), affirmed, 339 U.S. 974; *Fox* v. *United States,* 45 F. 2d 364, 365 (C.A. 7); *Didenti* v. *United States,* 44 F. 2d 537, 538 (C.A. 9); *Katz* v. *United States,* 273 Fed. 157, 159 (C.A. 1), certiorari denied, 257 U.S. 641. It is true that statements made by conspirators in furtherance of the conspiracy are binding upon each conspirator, but this is so even in the absence of a conspiracy count as proof on a substantive count. *United States* v. *Marchisio,* 344 F. 2d 653, 668 (C.A. 2). The evidence at trial determines the admissibility of such statements and acts. Since the names of unindicted co-conspirators were supplied by a bill of particulars petitioners cannot claim surprise.

3. Petitioners received concurrent suspended sentences on all counts on which they were convicted and a fine on only one count. Under the circumstances, there is no need to consider the question as to whether the trial court improperly refused to consolidate the ten substantive counts charging violations of 15 U.S.C. 17q(a) into a single count (Pet. 17–18).[6]

[6] The statute 15 U.S.C. 77q(a) defines the conduct prohibited as follows:

"(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

"(1) to employ any device, scheme, or artifice to defraud, or

"(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material

In any event, the contention is without merit. While the two district court cases on which petitioner relies (*United States* v. *Greenberg,* 30 F.R.D. 164 (S.D. N.Y.) and *United States* v. *Hughes,* 195 F. Supp. 795 (S.D. N.Y.)) do hold that each mailing will not necessarily constitute a separate offense,[7] they do not suggest that each offer or sale or transaction may not be pleaded in a separate count. Under the statute there is clearly a separate offense as to each person defrauded. And even where the same person is defrauded in several transactions, each sale or obtaining of money is a separate offense. This was recognized in the *Hughes* case on which petitioner relies (195 F. Supp. at 798). In each such instance there would be the separate impulse recognized in *United States* v. *Universal Corp.,* 344 U.S. 218. Here each count of the indictment charged a distinct transaction constituting a separate offense. There was thus no reason to consolidate the counts. See *Palmer* v. *United States,* 229 F. 2d 861, 867 (C.A. 10), certiorari denied, 350 U.S. 996; *Edens* v. *United States,* 239 F. Supp. 272 (E.D. Ark.); *United States* v. *Binstock,* 37 F.R.D. 13, 16 (S.D. N.Y.); *United States* v. *Bennett,* 36 F.R.D. 103, 107 (E.D. S.C.); *United States* v. *Van Allen,* 28 F.R.D. 329 (S.D. N.Y.).

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fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

[7] There is no court of appeals decision to such effect. *United States* v. *Cashin,* 281 F. 2d 669 (C.A. 2), involved questions of venue, not consolidation of counts.

4. The trial court properly refused the requested instruction that the jury must acquit of all substantive and conspiracy counts if they found two separate and independent schemes and conspiracies, one in connection with the IAT corporation and the other in connection with Venezuela Mines (Pet. 15–17). If one conspiracy or scheme is charged and two are proved, the central figures common to each, such as petitioners here, are clearly not entitled to an acquittal. *E.g., United States* v. *Benjamin,* 328 F. 2d 854 (C.A. 2), certiorari denied *sub nom. Howard* v. *United States,* 377 U.S. 953; *Monroe* v. *United States,* 234 F. 2d 49 (C.A. D.C.), certiorari denied, 352 U.S. 873; *United States* v. *Cohen,* 145 F. 2d 82, 88, 92 (C.A. 2), certiorari denied, 323 U.S. 799. Moreover, the evidence plainly showed that petitioners and Whitmore engaged in one overall scheme and conspiracy to defraud investors by the false and misleading representation that the companies had acquired foreign natural resource concessions for exploitation. While it is true that there were two promotions in progress during the course of the conspiracy, the same parties participated in both, and the same victims were urged to invest in both. The two promotions substantially overlapped in time. The jury found overt acts by Brown and Kent as to each promotion and both were found guilty of substantive counts involving both promotions. Thus, even if two conspiracies might have been found, petitioners were not prejudiced. See *Berger* v. *United States,* 295 U.S. 78, 82–83; *United*

States v. *Agueci*, 310 F. 2d 817, 826–828 (C.A. 2), certiorari denied, 372 U.S. 959.[8]

5. The claim that government counsel prejudicially relied on "repudiated direct testimony of key government witnesses" in summation (Pet. 18–20) is without merit. The transcript clearly reveals that the summation by government counsel was fully supported by the record. Thus, while it is true that Stanford vacillated on the stand as to whether Kent brought the timber venture to his attention (Tr. 685, 618–619, 689, 697), as argued by government counsel (Tr. 3107), the record was nonetheless replete with references substantiating the Government's contention, including Brown's own assertion that Stanford had told him that Kent had brought the venture to his attention (Tr. 25, 1002–1004, 2178–2179, 2781). Similarly, the statement of counsel in summation that Brown knew in February 1960 that Harris did not have concessions in Surinam (Tr. 3123) is completely supported by the record at trial, including the testimony of Harris on direct and cross-examination (Tr. 812–818, 826–827, 1093, 1097–1103, 1270–1271, 1293). Significantly, defense counsel did not object to those fragments of the prosecution's closing argument now characterized as misstatements.

[8] Petitioners' reliance (Pet. 15–16) on *Kotteakos* v. *United States*, 328 U.S. 750, is misplaced. The central figure who tied together the several conspiracies involved there was not before the Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967